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Supreme Court

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United States

OCTOBER TERM, 1973

No. 73-757

STUART LEVINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

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OCTOBER TERM, 1973

No. _____

STUART LEVINE,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

The Petitioner, STUART LEVINE, respectfully prays that a Writ of Certiorari issue to review the Judgment of the United States Court of Appeals for the Fifth Circuit entered in this proceeding on April 27, 1973 and September 12, 1973.

OPINIONS BELOW

The Court of Appeals affirmed without opinion Petitioner's conviction. 475 F.2d 1403. (See Appendix A hereto.) Petitioner's petition for rehearing was denied on June 20, 1973. (See Appendix B hereto.) Thereafter, Petitioner substituted counsel on appeal and was granted leave to file an out-of-time petition for rehearing. (See Appendix C hereto.) On September 12, 1973 Petitioner's out-of-time petition for rehearing was denied. (See Appendix D. hereto.)

JURISDICTION

The Judgment of the United States Court of Appeals for the Fifth Circuit was entered on April 27 and September 12, 1973. Petitioner was granted an extension of time to file this Petition to and including November 12, 1973. The jurisdiction of this Court is invoked under Title 28, United States Code, §1254(1) and Rule 19(1)(b), United States Supreme Court Rules.

QUESTIONS PRESENTED

I.

WHETHER THE PETITIONER WAS DENIED HIS SIXTH AMENDMENT GUARANTEE TO EFFECTIVE ASSISTANCE OF COUNSEL AND UNDIVIDED AND UNFETTERED LOYALTY OF COUNSEL?

(A) WAS PETITIONER'S COUNSEL, KESSLER, INCOMPETENT AND INEFFECTIVE DUE TO HIS LACK OF PREPARATION FOR AND PRESENTATION AT TRIAL?

(B) WAS PETITIONER'S COUNSEL, GRUSMARK, UNABLE TO RENDER THE REQUIRED UNDIVIDED AND UNFETTERED LOYALTY OF COUNSEL DUE TO HIS JOINT REPRESENTATION OF ALL DEFENDANTS?

(C) SHOULD THIS COURT REQUIRE ALL THE CIRCUITS TO IMPOSE ON THE TRIAL COURT A DUTY TO INQUIRE AND ASCERTAIN IF THERE IS A CONFLICT OF INTEREST WHERE MULTIPLE DEFENDANTS ARE JOINTLY REPRESENTED BY ONE ATTORNEY?

II.

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT BY THE GOVERNMENT'S FAILURE TO PROVE BY PETITIONER'S OWN ACTS AND DECLARATIONS THAT HE WILLFULLY JOINED THE CONSPIRACY CHARGED.

III.

WHETHER PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT BY THE GOVERNMENT'S FAILURE TO PROVE THAT THE PETITIONER AIDED AND ABETTED ANOTHER TO UNLAWFULLY POSSESS A FIREARM DURING THE COMMISSION OF A FEDERAL FELONY?

IV.

WHETHER FAILURE OF THE TRIAL COURT TO PROPERLY INSTRUCT THE JURY ON ALL THE ESSENTIAL ELEMENTS OF COUNT III SUBSTANTIALLY PREJUDICED PETITIONER CONTRARY TO DUE PROCESS OF LAW.

V.

WHETHER THE METHOD USED IN THE PLAN FOR THE SELECTION OF GRAND AND PETIT JURORS FOR THE UNITED STATES DISTRICT COURT FROM WHICH THE GRAND JURY AND THE PETIT JURY WERE SELECTED IS UNCONSTITUTIONAL ON ITS FACE AND "AS APPLIED" AND DENIED THE PETITIONER HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

United States Constitution,
Amendment Five:

> "No person . . . shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law. . . ."

United States Constitution,
Amendment Six:

> "In all criminal prosecutions, the accused shall enjoy the right to . . . an impartial jury of the . . . district . . . and to have the Assistance of Counsel for his defense."

Title 18, United States Code, §2(a) and (b):

> "(a) Whoever commits an offense against the United States or aids, abets, counsels, commands, induces or procures its commission, is punishable as a principal."

> "(b) Whoever willfully causes an act to be done which if directly performed by him or another would be an offense against the United States, is punishable as a principal."

Title 18, United States Code, §924(c)(2):

> "Whoever carries a firearm unlawfully during the commission of any felony which may be prosecuted in a Court of the United States . . ."

Title 21, United States Code, §846:

> "Any person who attempts or conspires to commit an offense defined in this subchapter is punishable by imprisonment or fine or both. . . ."

Title 21, United States Code, §963:

> "Any person who attempts or conspires to commit any offense defined in this subchapter is punishable by imprisonment or fine or both. . . ."

Title 28, United States Code, §1861:

> "It is the policy . . . that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected . . . from a fair cross section of the community in the district or division wherein the court convenes."

Title 28, United States Code, §1862:

> "No person shall be excluded from service as a grand or petit juror in the district courts of the United States on account of race, color, religion, sex, national origin, or economic status."

Title 28, United States Code, §1863(b)(4):

"(b) Among other things, such plan shall —

(4) provide a master jury wheel . . . The plan shall provide for periodic emptying and refilling of the master jury wheel at specified times. . . ."

Title 28, United States Code, §1865(b)(1):

". . . any person qualified to serve on grand and petit juries in the district court unless he —
(1) is not a citizen of the United States eighteen years old who has resided for a period of one year within the judicial district;"

STATEMENT OF THE CASE

On June 22, 1972 a four count indictment was returned by a Federal Grand Jury in Miami, Florida against the Petitioner and three others. Petitioner was charged in Count I with conspiring to import and distribute marihuana in violation of Title 21, United States Code, §846 and §963 and in Count III with having unlawfully aided and abetted another to carry a firearm during the commission of a federal felony, to-wit, the conspiracy delineated in Count I; in violation of Title 18, United States Code, §924(c)(2) and §2.

After Petitioner entered his plea of not guilty, his trial counsel filed a motion to dismiss the indictment alleging the unconstitutional method of selection of the Grand Jury. This motion was denied prior to trial. At the time of trial Petitioner's counsel renewed the motion to

dismiss the indictment, alleging the unconstitutional method of selecting the petit jury. This was denied as being untimely filed under Title 28, United States Code, §1867 (TR. 34-35).[1]

Thereafter Melvyn Kessler noted his appearance on behalf of Petitioner (TR. 44-45), but Petitioner's original counsel, Milton Grusmark, continued to represent the two other co-defendants and directed defense strategy for all defendants. (See Petitioner's Appendix E and Appendix F, infra.) The case was tried to a jury on August 21, 22 and 23, 1972. Petitioner was found guilty of Counts I and III and was sentenced on October 17, 1972 to four years incarceration and a $15,000.00 fine on Count I and one year incarceration on Count III, such sentence to be served concurrent with that imposed on Count I.

Appendix E and F were filed with Petitioner's out-of-time petition for rehearing. They averred that Petitioner's original counsel, Grusmark, brought in Kessler on the eve of trial solely to placate Petitioner; Kessler was unfamiliar with the facts of the case, made no investigation, neither filed nor reviewed pre-trial motions and discussed the case with Petitioner for only fifteen minutes on the eve of trial. Kessler also averred that at the conclusion of the government's case he and Petitioner desired that Petitioner testify in his own defense, but Grusmark objected and prevented such occurrence, alleging that to do so would prejudice the two co-defendants who were both convicted felons. Petitioner, a licensed pharmacist, suffered from no such disabling impediments.

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[1]Subsequent to this denial the United States Court of Appeals decided *United States v. Tarcisso Antonio de Alba Conrado*, 481 F.2d 1266 (5th Cir. 1973) which would appear to render the District Court's ruling erroneous.

The prosecution's case, as established at trial, consisted of the following events. In the middle of May, 1972 Agent Stevenson utilized the services of an informant, Juan Ortiz, to meet with defendants D'Orsay and Chippas in Miami, Florida (TR. 73-98). Although meetings between the informant, who did not testify at trial, and the defendants' Chippas and D'Orsay occurred on May 17th, 18th, 20th, and 23rd, Agent Stevenson participated only in the meeting between the informer and defendant D'Orsay on May 23rd. At that meeting Stevenson was introduced as a co-pilot to D'Orsay (TR. 84) and a discussion ensued concerning the importation of 3,000 pounds of marihuana from Jamaica to Leesburg, Florida. Stevenson testified that during this encounter D'Orsay said he sad a "piece" (gun) for us (Stevenson and Ortiz) (TR. 89). D'Orsay further related, according to Stevenson, the gun belonged to Stu. When the informer inquired as to whether he could keep the gun after this deal, D'Orsay replied that Stu wanted it returned (TR. 90). Stevenson also related that D'Orsay said he would keep in touch through Petitioner who, in turn, would be in touch with Chippas in Jamaica (TR. 90). Stevenson furthermore related the following statement of D'Orsay: once Chippas called Levine, D'Orsay would be in touch with Levine and thereafter D'Orsay would set up a meeting with Ortiz and Stevenson in order to give them money to rent an airplane and pay expenses to Jamaica (TR. 91-92). It was at this May 23rd meeting that D'Orsay gave a brown bag containing a gun to the informant (TR. 92-93). The gun was thereupon offered into evidence against all defendants. (TR. 93) and the Court denied Petitioner's request for a limiting instruction as to whom

and on what counts that weapon could be considered (TR. 95-96, 108-110). The Court did give, however, an imprecise instruction on general conspiracy law (TR. 123-124).

The only direct, non-hearsay, testimony against Petitioner concerned the brief encounter on May 24, 1972 at the Miami Airways Motel Coffee Shop (TR. 125-130). During this fifteen minute meeting Stevenson and the informer met with D'Orsay and Petitioner. D'Orsay related that Chippas was expecting Stevenson and the informer in Jamaica later that day. Neither Petitioner nor anyone in his presence discussed any subject which concerned illegal activities.[2] Upon leaving, Petitioner, silent throughout the meeting, requested the informer to follow him into the bar area, out of the hearing and sight of Stevenson. Petitioner and the informer then rejoined D'Orsay and Stevenson outside the coffee shop. Thereafter Stevenson and the informer departed together (TR. 130). When alone the informer gave Stevenson $1,900.00. The inference sought by the government to be deduced from this fact was that the money came from the Petitioner. The only factor which the government used to bolster this inference was the meeting the day prior, May 23rd, wherein D'Orsay told Stevenson the money for the cost of renting a plane to travel to Jamaica would be furnished by Petitioner. However, Petitioner was not present at this meeting (TR. 91-92). Further, nowhere in

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[2]Stevenson, at trial, started to relate his interpretation of what D'Orsay said, but stopped in mid-sentence (TR. 126-127). This partial gratuitous remark, not being a conversation of anyone at the May 24th meeting, cannot be considered against Petitioner.

the trial transcript are there conversations, even hearsay as to Petitioner, that the $1,900.00 tendered by the informer to Stevenson, was intended for the purchase of anything illegal.

Also, by stipulation, the Petitioner admitted that the firearm referenced in Count III was registered to him (TR. 217-218).

The Petitioner moved for a directed verdict at the close of the government's case and at the end of the trial (TR. 356-393).

Finally, the Court instructed the jury on the essential elements of Counts I and III (TR. 542-561).

REASONS FOR GRANTING THE WRIT

The decisions below should be reviewed by the Court for the folowing reasons:

I.

PETITIONER WAS DENIED HIS SIXTH AMENDMENT GUARANTEES TO EFFECTIVE ASSISTANCE OF COUNSEL AND UNDIVIDED AND UNFETTERED LOYALTY OF COUNSEL.

(A) PETITIONER'S COUNSEL, KESSLER, WAS INCOMPETENT AND INEFFECTIVE DUE TO HIS LACK OF PREPARATION FOR AND PRESENTATION AT TRIAL.

This Court has long ago established that assistance of counsel, as guaranteed by the Sixth Amendment, means *effective* assistance of counsel. *Powell v. Alabama,* 287 U.S. 45 (1932).

The Fifth Circuit standard of effectiveness is applied equally to either appointed counsel, *MacKenna v. Ellis,* 280 F.2d 592, 599 (5th Cir. 1960), modified, 289 F.2d. 928, *cert. den.* 368 U.S. 877, or retained counsel. *West v. Louisiana,* 478 F.2d 1026, 1032-1033 (5th Cir. 1973).

The standard ennunciated in the Fifth Circuit is "counsel reasonably likely to render and rendering reasonably effective assistance". *MacKenna v. Ellis, supra,* at 599. Analyzing this concept it is apparent that counsel must be cognizant of the current applicable criminal law, he must conduct an investigation and confer meaningfully with his client. *Caraway v. Beto,* 421 F.2d 636 (5th Cir. 1970); *Pennington v. Beto,* 437 F.2d 1281 (5th Cir. 1971). Additionally, counsel must also be prepared during the trial. He must cross-examine prosecution witnesses, present any viable defenses and timely object to improper courtroom procedure. *Collingsworth v. Mayo,* 173 F.2d 695 (5th Cir. 1949); *Sloan v. Wainwright,* 469 F.2d 390 (5th Cir. 1972).

A brief perusal of Appendix E and F, Affidavits of Petitioner and his trial counsel Kessler, bear out the total lack of trial preparation conducted by Kessler. Additionally, this fact is also substantiated by the trial record and record of proceedings. Kessler filed no pre-trial motions and did not note his appearance on behalf of Petitioner until the day of trial (TR. 44-45).

During the trial Kessler presented no evidence on behalf of Petitioner, issued no trial subpoenas, made no substantive motions and, in the final analysis, abdicated his position as Petitioner's trial counsel by allowing Grusmark to veto Petitioner's and Kessler's decision to have Petitioner testify in his own defense. (See Appendix E and F, infra.)

Kessler's representation of Petitioner was devoid of substance and below any bare minimal constitutional guarantee. To rationalize Petitioner's plight by highlighting the activity of Kessler at trial merely begins the inquiry. What was this activity about? Certainly it was not based on a detailed knowledge of his client's case, nor based on conversations had with the client, nor on independent investigation, nor on detailed and searching pre-trial motions filed by Kessler.

> "It is not enough to assume that counsel thus precipated into the case thought there was no defense, and exercised their best judgment in proceeding to trial without preparation. . . . No attempt was made to investigate (the facts of the case). . . . The record indicates that the appearance was rather pro forma than zealous and active. . . . Under the circumstances disclosed, we hold that defendants were not accorded the right of counsel in any substantial sense."
>
> *Powell v. Alabama,* 287 U.S. 45, 58 (1932).

(B) PETITIONER'S 'REAL' TRIAL ATTORNEY DID NOT PROVIDE THE REQUIRED UNDIVIDED AND UNFETTERED LOYALTY TO PETITIONER AT HIS TRIAL.

Grusmark, by his joint representation of the interests of three defendants (including Petitioner), effectively prevented Petitioner from receiving unfettered and undivided loyalty, a prerequisite to a finding of effective assistance of counsel. *Glasser v. United States,* 315 U.S. 60, 76 (1942).

Throughout the whole trial, with the exception of one brief meeting on May 24, 1972 (TR. 125-130), hearsay evidence concerning the Petitioner went without objection. To have objected Grusmark would have only highlighted Chippas' and D'Orsay's involvement.

Other instances abound throughout the trial record where the conflict caused by Grusmark's joint representation of all three defendants irreparably prejudiced Petitioner. The most glaring was the narration by Agent Logay of a post-arrest statement by D'Orsay (TR. 241-243). But not one objection followed from the defense attorneys. Not one request for a limiting instruction was made. Clearly such statement by the government in their case-in-chief put D'Orsay's character in issue, contrary to *Michelson v. United States,* 335 U.S. 469, 475 (1948); and *United States v. Gray,* 468 F.2d 257, 260-261 (3rd Cir. 1972) (en banc). Assuming arguendo that such prejudicial statement was admissible against D'Orsay, under no rule of evidence could such be considered against the

Petitioner. Grusmark should have objected as to his clients Chippas and Petitioner. But due to his fettered and divided loyalties and for fear such objection would highlight D'Orsay's nefarious background, Grusmark refrained from objecting, thereby prejudicing Petitioner.

Petitioner's predicament was identical to that of Glasser's. In *Glasser, supra,* the chief testimony against Glasser was hearsay statements of Kretske, a co-defendant jointly represented by Glasser's lawyer. Glasser contended that all of Kretske's statements to government witnesses were inadmissible hearsay as to him and Glasser's lawyer had failed to object to such because such objection would leave the jury with the impression that the testimony was true as to Kretske. This Court agreed with Glasser's assertion, finding that the non-hearsay testimony against Glasser was rather meager by comparison with the other co-defendants (315 U.S. at 75).

At the conclusion of the government's case both Appellant and Mr. Kessler believed that the only successful defense for Petitioner was to allow this businessman with an exemplary background to take the witness stand in his own defense.[3] Grusmark overruled this decision, stating that such course of conduct would prejudice D'Orsay and Chippas.[4] However, such decision is properly the clients', and not the attorneys'. See *Morgan v. United States,* 396 F.2d 110, 113 (2nd Cir. 1968).

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[3]See Appendix E.

[4]See Appendix F.

Nowhere was Gusmark's actual conflict more manifest than in this decision not to allow Petitioner to testify in his own defense. Appelant had no prior felony convictions which could detract from his credibility before a jury. However, Petitioner's testifying in his own defense would single out the other two defendants' failure to testify. The existence of this conflict, without more, is sufficient to require reversal. *Glasser v. United States, supra,* at 75; *United States v. Foster,* 469 F.2d 1, 4 (1st Cir. 1972).

In *Glasser,* this Court said,

> "To determine the precise degree of prejudice sustained by Glasser as a result of the court's appointment of Stewart as counsel for Kretske is at once difficult and unnecessary. The right to have the assistance of counsel is too fundamental and absolute to allow courts to indulge in nice calculations as to the amount of prejudice arising from its denial. (citing cases)"
>
> 315 U.S. at 75-76.

When Petitioner informed Gusmark that he wished to testify in his own defense and establish that his presence on May 24, 1972 at the Miami Airways Motel Coffee Shop was at the request of one of the other co-defendants and that he, Petitioner, had no knowledge of the purpose of said meeting, Gusmark's decision either way would prejudice one or more of the defendants. By merely raising the dilemma is to concede the real conflict which confronted Grusmark.

Finally, Petitioner did not waive the issue of divided loyalties of his trial counsel. *United States v. Lovano,* 420 F.2d 769, 773, Fn. 12 (2nd Cir. 1970), *cert. den.* 397 U.S. 1071; *Ford v. United States,* 379 F.2d 123, 125 (D.C. Cir. 1967); *Glasser v. United States,* 315 U.S. 60, 70-71, 62 S.Ct. 457, 465 (1942); *Johnson v. Zerbst,* 304 U.S. 458, 464 (1938).

(C) THIS COURT SHOULD REQUIRE ALL THE CIRCUITS TO IMPOSE ON THE TRIAL COURT A DUTY TO INQUIRE AND ASCERTAIN IF THERE IS A CONFLICT OF INTERESTS WHERE MULTIPLE DEFENDANTS ARE JOINTLY REPRESENTED BY ONE ATTORNEY.

The decision as to whether divided loyalties in joint representations exist should not be left to the legally uninformed and ignorant client. It should devolve upon the Trial Court *sua sponte.*

This rule is followed in only the District of Columbia, the First and Second Circuits. However, it should be mandatory throughout the circuits.

"(A)n individual defendant is rarely sophisticated enough to evaluate the potential conflicts, and when two defendants appear with a single attorney it cannot be determined, absent inquiry by the trial judge, whether the attorney has made such an appraisal or has advised his clients of the risks." *Campbell v. United States,* 352 F.2d 359, 360 (D.C. Cir. 1965).

The Criminal Justice Act, Title 18, United States Code, §3006A(b), states that "the court *shall* appoint separate counsel for defendants who have such conflicting interests that they cannot properly be represented by the same counsel." *Ford v. United States*, 379 F.2d 123, 125 (D.C. Cir. 1967) (emphasis supplied by court.); *Lollar v. United States*, 376 F.2d 243, 245 (D.C. Cir. 1967).

Substantial "considerations of efficient judicial administration as well as important rights of defendants (will be) served when the trial judge makes the *affirmative* determination that co-defendants have intelligently chosen to be represented by the same attorney and that their decision was not governed by poverty and lack of information on the availability of assigned counsel." *Campbell v. United States*, 352 F.2d 359, 360 (D.C. Cir. 1965) (emphasis supplied). Accord: *Morgan v. United States*, 396 F.2d 110 (2nd Cir. 1968); *United States v. Lovano*, 420 F.2d 769 (2nd Cir. 1970); *United States v. Wisniewski*, 478 F.2d 274 (2nd Cir. 1973); *United States v. Foster*, 469 F.2d 1 (1st Cir. 1972). These considerations of judicial administration should compel this Court to require all circuits to impose upon the trial court, *sua sponte*, the duty to inquire and determine that jointly represented defendants have counsel free to render undivided loyalty.

II.

PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT BY THE GOVERNMENT'S FAILURE TO PROVE BY PETITIONER'S OWN ACTS AND DECLARATIONS THAT HE WILLFULLY JOINED THE CONSPIRACY CHARGED.

Petitioner was convicted of conspiring to import and distribute marihuana during May, 1972. Petitioner, while not conceding, does not contest that there was sufficient evidence from which a jury could infer the existence of the conspiracy charged. What Petitioner does contest is the total lack of evidence showing that he willfully joined such conspiracy with knowledge of the conspiracy's objectives. *Blumenthal v. United States*, 332 U.S. 539, 558, 68 S.Ct. 248, 257 (1947).

In order for the government to establish that Petitioner became a knowing member of the conspiracy, the Court and ultimately the jury can consider only Petitioner's own acts and declarations. *Glasser v. United States*, 315 U.S. 60, 74, 62 S.Ct. 457, 567 (1942). In this case Petitioner made no statements. Only through circumstantial evidence and basing an inference on an inference is there even an *act* imputable to Petitioner. The source of the money, which the informant delivered to Agent Stevenson, is attributable to Petitioner only circumstantially. In order to add meaning to this neutral act the Court must, as the judge and the jury did below, infer from a meeting the day prior, in which Petitioner did not participate in or have knowledge of, that the money allegedly tendered by Petitioner to the informant was for the purpose of paying for a rental plane to haul marihuana from Jamaica to Miami. However, there are other, more obvious, innocent inferences from such event. It could reasonably be inferred that Petitioner was loaning money on behalf of a friend to the informer for a legitimate business deal. The record is silent as to any prior or contemporaneous understanding Petitioner had with D'Orsay.

It is more plausible to infer D'Orsay requested Petitioner to loan him $1,900.00 to consumate a legitimate business deal. When the record is silent as to Petitioner's intention in loaning the money, it is decidedly a denial of due process of law to allow a jury to speculate on Petitioner's guilt.

In *Thompson v. City of Louisville*, 362 U.S. 199, 206, 80 S.Ct. 624, 629 (1960) this Court held that it violates due process of law under the Fourteenth Amendment to allow a conviction to stand when there is a lack of evidence in the trial record to support the guilt of the accused.

In *United States v. Falcone*, 311 U.S. 205, 210-211, 61 S.Ct. 204, 207 (1940), this Court, in reversing the convictions of several sellers of merchandise to unauthorized distillers, held that the furnishing of supplies to an illicit distiller does not make the supplier part of the conspiracy to distill liquors illegally, "even though his sale may have furthered the object of a conspiracy to which the distiller was a party, but of which the supplier had no knowledge."

In the case *sub judice*, Petitioner advanced funds on behalf of a co-conspirator to third parties. That is all the evidence, and all the reasonable inferences therefrom, can support. The money was ostensibly to rent a plane, an otherwise legal undertaking. Therefore, without showing Petitioner's knowledge of the conspiracy, and his willful participation in that conspiracy with knowledge of its overall objectives, Petitioner's conviction cannot stand.

Blumenthal v. United States, 332 U.S. 539, 557, 68 S.Ct. 248, 256 (1947); *United States v. Falcone*, 311 U.S. 205, 210, 61 S.Ct. 204, 207 (1940); *Direct Sales Co. v. United States*, 319 U.S. 703, 709, 63 S.Ct. 1265, 1268 (1943).

Due process requires that Petitioner's guilt be established beyond a reasonable doubt. *In Re Winship*, 397 U.S. 358, 90 S.Ct. 1068 (1970). Clearly, the evidence in this case fails to do such.

III.

PETITIONER WAS DENIED DUE PROCESS OF LAW UNDER THE FIFTH AMENDMENT BY THE GOVERNMENT'S FAILURE TO PROVE THAT THE PETITIONER AIDED AND ABETTED ANOTHER TO UNLAWFULLY POSSESS A FIREARM DURING THE COMMISSION OF A FEDERAL FELONY.

Count III of the indictment charged that Petitioner and D'Orsay "knowingly and unlawfully carried a . . . pistol . . . during the commission of a conspiracy to import marihuana . . . all in violation of . . . law." Petitioner was not charged as a principal but as an aider and abettor. The evidence showed that on May 23, 1972, D'Orsay, not Petitioner, met with a Government Agent and a confidential informant and discussed a planned trip to Jamaica; that at this meeting D'Orsay, and not Petitioner, had the weapon in question; and that D'Orsay, not Petitioner, had previously been convicted of a felony.

There is insufficient evidence, even taking a view most favorable to the government, *Glasser, supra,* on which the jury could conclude that Petitioner aided and abetted D'Orsay in his possession of the weapon. The evidence merely showed that the weapon in question was registered to Petitioner (TR.217). There is no evidence Petitioner supplied D'Orsay with the weapon or how D'Orsay obtained possession of the weapon. Unless there was evidence that Petitioner gave or loaned D'Orsay the weapon, he certainly cannot be found to have aided and abetted D'Orsay's possession in violation of §924(c)(2). *Thompson v. Louisville, supra.*

Assuming *arguendo* that there was sufficient evidence to conclude that Petitioner knowingly furnished D'Orsay with the weapon, the evidence is still insufficient to establish Petitioner's aiding and abetting. To aid and abet one in the violation of a substantive crime, it must be found that the act of participation was done by the particular individual knowing it was for the purpose of furthering that particular venture set forth in the count. *United States v. Greer,* 467 F.2d 1064 (7th Cir.) *cert. den.,* 93 S.Ct. 1364 (1973); *United States v. Calabro,* 467 F.2d 973 (2nd Cir.) *cert. den.,* 93 S.Ct. 1891 (1973); *United States v. Howell,* 447 F.2d 1114 (2nd Cir. 1971).

Yet there is no evidence in this record to indicate that Petitioner supplied the weapon knowing it was to be used in the commission of a federal felony. Furthermore, there is no evidence as to the date when Petitioner furnished D'Orsay the weapon. The evidence only indicates that D'Orsay obtained possession on some unknown date between September, 1967 and May 23, 1972 (TR. 90,

218). While it is possible that Petitioner furnished D'Orsay with the weapon after May 10, 1972 (the date the conspiracy allegedly began) and knew that D'Orsay intended to use it in the conspiracy, it is just as likely that D'Orsay obtained possession prior to the beginning of the conspiracy and that the Petitioner did not intend for it to be used in the conspiracy.

The mere possibilities that Petitioner furnished D'Orsay with the weapon between May 10th and 23rd, 1972, and knew that it was going to be used in the conspiracy is not proof of those facts. *United States v. Martinez*, ____ F.2d ____ (5th Cir. decided on October 12, 1973, Slip Opinion No. 72-3133, p. 19). Petitioner's conviction on Count III without any evidence establishing its essential elements deprived him of due process of law. *Thompson v. Louisville*, and *In Re Winship*, both *supra*.

IV.

THE FAILURE OF THE TRIAL COURT TO PROPERLY INSTRUCT THE JURY ON ALL THE ESSENTIAL ELEMENTS OF COUNT III SUBSTANTIALLY PREJUDICED PETITIONER'S CONVICTION AND REQUIRES REVERSAL.

Count III of the indictment charged that Petitioner and D'Orsay "knowingly and *unlawfully carried* a .25-caliber Beretta pistol . . . during the commission of a conspiracy to import marihuana into the United States contrary to . . . (law)." (Emphasis added.)

In order to establish a violation of Title 18, United States Code, §924(c)(2) the essential element that the defendant's possession of the firearm itself is unlawful must be proven. *United States v. Ramirez*, 482 F.2d 807, 814 (2nd Cir. 1973). The jury must be so instructed. *Id.* at 814. The failure of the trial court to instruct on an essential element of a crime is plain error. Rule 52(b), *Federal Rules of Criminal Procedure; United States v. Williams*, 463 F.2d 958 (D.C. Cir. 1972); *United States v. Byrd*, 352 F.2d 570 (2nd Cir. 1965); *Byrd v. United States*, 342 F.2d 939 (D.C. Cir. 1965). Notwithstanding the absence of an objection below to the charge as given, *Johnson v. United States*, 318 U.S. 189; *United States v. Atkinson*, 297 U.S. 157; *Clyatt v. United States*, 197 U.S. 207; *United States v. Byrd* and *Byrd v. United States*, both *supra*, the conviction must be reversed. *Screws v. United States*, 325 U.S. 91; *United States v. Ramirez, supra; United States v. Williams, supra*, and *United States v. Byrd, supra.*

> "Count 3 of the Indictment charges only the defendants D'Orsay and Stuart Levine with knowingly carrying a .25-caliber Beretta pistol, Serial No. G-17124, during the commission of a conspiracy to import marijuana into the United States, in violation of Title 18, United States Code, Section 924(c)(2), and Title 18, United States Code, Section 2.
>
> Now, in order to convict either of these defendants under this charge, you must find the following elements have been proved beyond a reasonable doubt by the Government:

1. that a conspiracy to import marijuana into the United States existed;

2. that a defendant charged — in other words, either the defendant D'Orsay or Levine — with the offense involving the .25-caliber Beretta pistol, Serial No. G-17124, was a member of a conspiracy to import marijuana into the United States; and

3. that a defendant who was a member of a conspiracy to import marijuana into the United States did actually carry the .25-caliber Beretta pistol, Serial No. G-17124, on or about May 23, 1972, in Miami, Dade County, during the commission of the conspiracy to import marijuana."

(TR. 553-554)

The record discloses that the trial court failed to charge the jury on the essential element of §924(c)(2), i.e., that Petitioner had to know that D'Orsay's possession of the firearm itself was unlawful. Accordingly, Petitioner's conviction must be reversed. *United States v. Ramirez, supra.*

V.

THE METHOD USED IN THE PLAN FOR THE SELECTION OF GRAND AND PETIT JURORS FOR THE UNITED STATES DISTRICT COURT FROM WHICH THE GRAND JURY AND THE PETIT JURY WERE SELECTED IS UNCONSTITUTIONAL ON ITS FACE AND "AS APPLIED" AND DENIED THE PETITIONER HIS SIXTH AMENDMENT RIGHT TO A FAIR TRIAL, AND HIS FIFTH AMENDMENT RIGHT TO DUE PROCESS OF LAW.

A. THE OPERATION OF THE PLAN FOR SELECTION OF GRAND AND PETIT JURORS IN THE SOUTHERN DISTRICT OF FLORIDA:

> "Whether . . . (a cognizable group) exists within a community is a question of fact. When the existence of a distinct class is demonstrated, and it is further shown that the laws, as written or applied, single out that class for different treatment . . . the guarantees of the Constitution have been violated."
>
> *Hernandez v. Texas*, 347 U.S. 475, 74 S.Ct. 667 (1954).

Petitioner alleges the Plan in effect at the time of his indictment and trial excluded persons twenty-one (21) to twenty-five (25), persons who had attained residency subsequent to June 30, 1968, and persons of Latin American descent.[5] Further, that these exclusions resulted from the

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[5]The classes allegedly excluded certainly compose a "larger and identifiable segment of the community." Cf. *Peters v. Kiff*, 92 S.Ct. 2163 (1972). The Spanish-speaking population in Dade County alone is 299,217. Table P., p.23, Statistical Area of Miami, Florida, U.S. Bureau of the Census, 1970. New residents are a huge portion of the local population. It was estimated that "75 percent of the increased population of Dade County in the years 1960-1969 was a result of in-migration" of persons 18 to 24 and probably number close to 200,000.

failure of the Clerk and of the Plan under which he operates, to replenish and add to the pool since July, 1968. The Plan itself is unconstitutional on its face insofar as it denies persons between the ages of 21 to 25 the right to be considered for Jury service; is unconstitutional as applied in the Miami Division insofar as it denies Latin Americans or Cubans and new residents the same right.

Additionally, the Clerk failed to comply with the Plan's requirement, *United States v. Blair,* 470 F.2d 331, 335 (5th Cir. 1972), *cert. den.* 93 S.Ct. 1536, (that the voter registration lists be updated to the "latest practicable date"), when he initially filled the wheel.

Case law in the Fifth Circuit has not finally disposed of these points.

1. *United States v. Allen,* 445 F.2d 849 (5th Cir. 1971).

Allen attacked the composition of the grand jury which indicted him because persons under 21 were excluded. The Court, holding "nothing identifiable or distinctive about young adults under 21 sets them apart from young adults over 21" *Id.*, at 849, did not address itself to the exclusion of the 18 through 25 year old category, or the 21 through 25 group.

2. *United States v. Kuhn,* 441 F.2d 179 (5th Cir. 1971); *United States v. Pentado,* 463 F.2d 355 (5th Cir. 1972), *cert. den., sub nom. Ochoa v. United States,* 93 S.Ct. 698 (1973).

Kuhn determined that the Plan, operating under the Act which permitted refilling of the jury wheel every five years, complied with the Act. *Kuhn* does not address itself to the constitutional issues raised herein or the question of the Clerk's compliance with the Plan.

In *Pentado,* the Court held that the defendants failed to meet their burden of demonstrating the exclusion of persons of Spanish ancestry from Jury Service, saying at page 359:

> ". . . [An] examination of the record reveals no evidence of any exclusionary policy or practice. To the contrary, the Clerk of the United States District Court for the Southern District of Florida testified that no persons of Spanish ancestry, or any other cognizable groups, were excluded from jury duty."

But the mere fact that the Clerk testified that no groups were excluded from jury duty is not sufficient, in and of itself, to foreclose the possibility of an improperly constituted jury. *Whitus v. Georgia,* 385 U.S. 545, 87 S.Ct. 643 (1967).

In *Kuhn,* and *Pentado,* the defendants failed to make a requisite showing in support of either their constitutional argument (*Kuhn* and *Pentado*) or in support of their argument of non-compliance with the Plan (*Pentado*). *Kuhn* lays to rest any attack upon the validity *vel non* of the Plan in the Northern District of Florida. *Pentado* lays to rest the efficacy of the Plan in the South-

ern District of Florida when no facts demonstrate that some other practicable and feasible basis existed for supplementation of names.[6]

Kuhn and *Pentado* did not intend to foreclose every future defendant attempting to show that substantial and identifiable classes of citizens have been excluded. *Peters v. Kiff, supra.* Nor do these cases prohibit a defendant from demonstrating it was practicable for the clerk to add the names of newly registered voters to the jury pool.

This Court has taken a broad view of the right of a defendant to challenge jury selection methods. *Peters v. Kiff, supra. Peters* is not limited to racial exclusions. The possibility of age and residence being found to be a "large and identifiable segment of the community" is distinct. *United States v. Butera,* 420 F.2d 564, (1st Cir. 1970). And the cognizable classes are many: persons with limited incomes, *Thiel v. Southern Pacific Co.,* 328 U.S. 217 (1946); *Labat v. Bennett,* 365 F.2d 698, 719-720 (5th Cir. 1966); women, *Ballard v. United States,* 329 U.S. 187, 192-193;

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[6]First the clerk himself could have been called to testify as to the composition of the jury pool and the methodology of replenishing that pool. The availability of voter registration lists, and the new names added to these lists since 1968 could have been offered by the Supervisor of Elections. Then expert census data could have been proferred to show that the failure to replenish distorted and substantially affected the fair cross-section concept envisioned by 28 U.S.C. §1861 et seq.

Blair noted that the plan had been in effect for only one year when the attack was made. The plan had been operative for more than four years at the time of the present indictment. The additional years, plus the large in-migration to Dade County, especially the influx of Cubans from 1963 to 1967, who did not become eligible for citizenship until 1968-1972, means that what was lacking in *Pentado* is present here.

young people between 21 and 34, *United States v. Butera, supra;* persons with less than a twelfth grade education, *United States v. Butera, supra; Thiel v. Southern Pacific Co., supra; Labat v. Bennet, supra;* Latin Americans, *Hernandez v. Texas, supra.*

3. *United States v. Blair,* 470 F.2d 331 (5th Cir. 1972).

Blair simply did not address itself to the exclusion of young adults 18 to 24, Cuban Americans or new residents. The continued exclusion of these groups violates the Fifth Amendment. Neither did *Blair* consider the *up-dating* of the voter registration lists.

4. *United States v. Gooding,* 473 F.2d 425 (5th Cir. 1973).

While entertaining an attack on jury composition because of alleged exclusions of young adults and Cuban Americans, the question in *Gooding* was limited to the frequency of up-dating the Master Juror Wheel and did not extend to those raised by Petitioner below. Moreover the Court's language, at page 430,

> "We do not believe the classes . . . who have become eligible for jury service by becoming citizens within the last 3 years and 4 months are such distinct groups that their temporary exclusion . . . violates their statutory right to serve on juries or defendant's right to a fair trial."

is severely questioned by *United States v. Tarciso Antonio De Alba-Conrado,* 481 F.2d 1266 (5th Cir. 1973). In the latter case the juror list lacked "Latin names" and the Court said,

> "While not ruling on whether appellant has asserted a cognizable constitutional deprivation . . . his motion . . . has sufficient constitutional implications to compel us to remand this case."

Id., at 1270.[7]

B. THE UNCONSTITUTIONALITY OF 28 U.S.C. §1865:

Title 28, United States Code §1865 (b)(1) provides:

> "(b) In making such determination the chief judge of the district court, or such other district court judge as the plan may provide, shall deem any person qualified to serve on grand or petit juries in the district court unless he —
>
> (1) is not a citizen of the United States twenty-one years old who has resided for a period of one year within the judicial district."

Shapiro v. Thompson, 394 U.S. 618, 642, 89 S.Ct. 13, 22 (1969) declared unconstitutional residence requirements used to determine eligibility for welfare assistance. If absent a "compelling" interest, a state could not create classifications based upon residence, *Id.*, at 638, the result was the same when the Federal Government sought to impose such a classification *Id.*, at 642.

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[7]Footnote 7 at p. 1270 added,

"Appellant should establish by appropriate proof that Latin Americans are clearly a cognizable class or ethnic group in the Miami Division if such is a fact . . . (citations omitted)."

In *Dunn v. Blumstein*, 405 U.S. 330, 92 S.Ct. 995 (1972), this Court declared unconstitutional Tennessee's one-year residence requirement for voting, suggesting a 30-day standard instead. The rule of *Dunn v. Blumstein* that a state's one-year residence requirement for voting is unnecessary to further a compelling state interest and violates equal protection by burdening a citizen's right to travel, requires a holding: (a) that Section 1865's one-year residency is similarly unconstitutional; and (b) that the clerk's method of selection from voter registration lists in this state by itself, would clash with the right to travel."[8]

The nomadic propensities of Americans are well known; Florida has become the destination of many of these travelers. The net in-migration to Dade County in 1968 was 27,295 persons; in 1969, 30,145; in 1970, 36,200; in 1971, 41,000. Seventy-five percent of the increased population of Dade County in the years 1960-1969 was the result of in-migration. By excluding this large number of people, a whole category of unique persons is precluded from jury service.

C. THE PLAN IS UNCONSTITUTIONAL ON ITS FACE INSOFAR AS IT DENIES PERSONS BETWEEN THE AGES OF 21 TO 25 THE FUNDAMENTAL RIGHT OR THE OPPORTUNITY TO BE CONSIDERED FOR JURY SERVICE.

[8]See Art. 6, §2, Florida Constitution, requiring one-year state residency and six months' county residency as voter requirements.

By adopting a four-year cycle for jury selection, the Plan singles out young persons who come of age during the period and excludes them from consideration as jurors. In this case the excluded class is those who are 21 to 25[9]. That classification cannot withstand constitutional scrutiny.

"While the Fifth Amendment contains no equal protection clause, it does forbid discrimination that is 'so unjustifiable as to be violative of due process.' " *Shapiro v. Thompson, supra,* at page 642.

There is no rational reason or compelling interest which justifies the outright exclusion of 21 to 25 year olds[10] They are a part of the community. The Petitioner is entitled to a jury selected from a cross-section of the community. Title 28 United States Code §1861. Constitutional guarantees are not contingent upon their cost. Cf. *Shapiro v. Thompson,* 394 U.S. at 633. Indeed, the testimony taken in *United States v. O'Connor,* 72-351-CR-JE, revealed that up-to-date supplementation could be accomplished with negligible expenditures of time and money.

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[9]Because Congress has lowered the age of service to 18, Pub. L. No. 92-269 (April 6, 1972), the excluded class in later cases will be 18 to 22.

[10]This argument does not require any determination of "cognizability" or "uniqueness." It is enough that the group exists and that by foreclosing its consideration the drafters of the Plan decided to treat 21 to 25 year olds in a special, discriminatory way.

Title 28 United States Code §1863(b)(4) says: "The Plan shall provide for periodic emptying and refilling of the master jury wheel at specified times." Nowhere does the Act itself approve of a four-year plan, although it does not disapprove of it. More important: the Act *permits* continuous updating, even if it does not require it. Thus the flexibility within the Act overcomes any argument that the Act justifies a four-year exclusion of young adults. It was the Committee on the Operation of the Jury System, under authority of the Judicial Conference of the United States which wrote in their guidelines:

> "The Act requires the plan to fix the time when the master jury wheel must be emptied and refilled. In most cases this will be every 2 or 4 years."

United States v. Kuhn, 441 F.2d at 181.

This classification, depriving 21 to 25 year olds of consideration for jury service was, and is, an administrative one. It is unjustified and unjustifiable and deprives the Petitioner of a broad-based jury system. See *Ballard v. United States,* 329 U.S. 187, 195, 67 C.Ct. 261 (1946).

D. THE PLAN IS UNCONSTITUTIONAL AS APPLIED IN THE MIAMI DIVISION INSOFAR AS IT DENIES LATIN AMERICANS OR CUBANS AND NEW RESIDENTS THE FUNDAMENTAL RIGHT OR THE OPPORTUNITY TO BE CONSIDERED FOR JURY SERVICE.

The Miami Division of the Southern District of Florida is unique. Since 1968, 24,661 Spanish-surnamed individuals have become naturalized here. These people represent 83% of all the Spanish-surnamed persons who became citizens in the Miami Division since 1962.

The Miami Division has also witnessed a huge in-migration of new residents who resided in other states. According to voter registration data, 42.8% of the presently registered voters were not represented in the 1968 lists used to fill the master jury wheel.

The attribute of flexibility which the Plan had had until *Blair* would have permitted inclusion of the newly naturalized and enfranchised Latins, and the other new residents. But the Plan operating in tandem with the unique changes in the Miami Division has classified nearly all the Latins or Cubans, and all of the new residents as non-persons insofar as consideration for jury service is concerned.

These classifications were not inherent in the Plan. If the Miami Division had remained static both as to Cubans and in-migrant new residents, the Plan would not be unconstitutional. But as applied to the operative population characteristics of the Miami Division since 1968, the Plan has created arbitrary, unreasonable and unjustifiable classifications denying Latin American or Cubans and new residents the right and the opportunity to be considered for jury service. This discrimination violates the Fifth Amendment Cf. *Shapiro v. Thompson, supra.*

E. THE CLERK DID NOT COMPLY WITH THE REQUIREMENT OF THE PLAN THAT THE VOTER REGISTRATION LISTS BE UPDATED TO "THE LATEST PRACTICABLE DATE" WHEN HE INITIALLY FILLED THE WHEEL.

No testimony was taken on this point in *United States v. O'Connor*, No. 72-351-CR-JE, etc., because until the corrected version of *Blair*, there was no question about what was meant by supplementation. Now it is necessary to add to this prior record evidence which will cast light upon the actions of the clerk vis-a-vis supplementation.

The existing record in *United States v. O'Connor, supra*, raises serious questions of supplementation. It appears from the testimony taken therein that although secured in June, the voter registration lists represented registration as of an earlier month. For example, in June 1968, the Dade County list contained 424,590 names, yet the list utilized by the Clerk had only 388,745 names (Table #1 Attached to Plan; I 67). The lists could not have been more recent than May 1968. Perhaps the lists from all three counties in the Miami Division were even older. No evidence was presented in *United States v. O'Connor, supra*, concerning the latest time to which it would have been "practicable" to include subsequent registrants. The wheels, however, were not finally set up until March 1969 (Tr. of Sept. 28, 1972, p. 105), but there is no way, short of another hearing that the new question of practicability can be determined. Such a hearing has been requested in *United States v. O'Connor*.

F. THE PLAN IS INCONSISTENT WITH AND VIOLATES THE ACT.

Title 28 United States Code §1861 provides:

> "§1861. Declaration of policy.
>
> It is the policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand and petit juries selected at random from a fair cross-section of the community in the district or division wherein the court convenes. It is further the policy of the United States that all citizens shall have the opportunity to be considered for service on grand and petit juries in the district courts of the United States, and shall have an obligation to serve as jurors when summoned for that purpose."

If the Court does not agree that the Plan suffers constitutional defects, then there exists, as a minimum, a violation of §1861. The classifications created by the Plan, both facial and as applied to the Miami Division, violate the fair cross-section concept.

CONCLUSION

The Petition for Certiorari should be granted and the judgment of the Court of Appeals reversed.

Respectfully submitted,

/s/ William P. Cagney III

William P. Cagney III

Attorney for Petitioner
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true copy of the foregoing Petition for Writ of Certiorari to the United States Court of Appeals, Fifth Circuit, was served this 12th day of November, 1973 upon the following persons by depositing a copy of same addressed to each in the United States Mail with sufficient air mail postage prepaid.

JEROME B. ULLMAN, JR., A.U.S.A.
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and

Solicitor General of the United States
United States Department of Justice
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/s/ William P. Cagney, III
WILLIAM P. CAGNEY, III

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3367
Summary Calendar*

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STUART LEVINE, LOUIS HARRY CHIPPAS
and ROBERT D'ORSAY,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

(April 27, 1973)

Before THORNBERRY, GOLDBERG and RONEY,
Circuit Judges.

PER CURIAM: AFFIRMED.[1] See Local Rule 21.[2]

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*Rule 18, 5th Cir.; see Isbell Enterprises, Inc. v. Citizens Casualty Company of New York, et al, 5th Cir. 1970, 431 F.2d 409, Part I.

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[1]All three appellants contend that (1) the evidence was insufficient to support their convictions for conspiring to import, possess, and distribute marijuana, (2) two bags of marijuana were admitted against them without proof that appellants possessed the bags and without proof of chain of custody, (3) Cuban immigrants and young adults were systematically excluded from their grand and petit juries, and (4) their convictions resulted from improper "creative activity" by Government agents. Appellants Levine and D'Orsay, attacking their convictions for carrying a firearm during commission of a felony, 15 U.S.C. § 924(c)(2), contend that the Government failed to prove that the firearm was actually used in the commission of the felony. Appellant D'Orsay, who was convicted below of possession of a firearm by a convicted felon in violation of 18 U.S.C. App. § 1202, argues that there was insufficient proof that the gun had moved in interstate commerce.

[2]See NLRB v. Amalgamated Clothing Workers of America, 5th Cir. 1970, 430 F.2d 966.

IN THE

UNITED STATES COURT OF APPEALS

FOR THE FIFTH CIRCUIT

No. 72-3367

UNITED STATES OF AMERICA,

Plantiff-Appellee,

versus

STUART LEVINE, LOUIS HARRY CHIPPAS and ROBERT D'ORSAY,

Defendants-Appellants.

Appeals from the United States District Court for the Southern District of Florida

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ON PETITION FOR REHEARING AND PETITION FOR REHEARING EN BANC

(Opinion April 27, 1973 , 5 Cir., 1973, F.2d).

(June 20, 1973)

Before THORNBERRY, GOLDBERG, and RONEY, Circuit Judges.

PER CURIAM: The Petitions for Rehearing are DENIED and no member of this panel nor Judge in

regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 12) the Petition for Rehearing En Banc is DENIED.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3367

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STUART LEVINE, LOUIS HARRY CHIPPAS,
and ROBERT D'ORSAY,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the motion of William P. Cagney, III, Esquire, to file appearance as attorney of record for defendant-appellant, Stuart Levine, in the above cause, is hereby granted.

IT IS FURTHER ORDERED that the motion of defendant-appellant, Stuart Levine, for permission to file an out-of-time petition for rehearing in the above cause, is hereby granted.

FILED July 11, 1973, U.S. Court of Appeals, Edward W. Wadsworth, Clerk.

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

No. 72-3367

UNITED STATES OF AMERICA,
Plaintiff-Appellee,

versus

STUART LEVINE, LOUIS HARRY CHIPPAS,
and ROBERT D'ORSAY,
Defendants-Appellants.

Appeals from the United States District Court for the
Southern District of Florida

Before THORNBERRY, GOLDBERG and RONEY, Circuit Judges.

BY THE COURT:

IT IS ORDERED that the petition of appellants Stuart Levine and Louis Harry Chippas for reconsideration of the Court's Order striking their out-of-time petitions for rehearing, filed in the above styled and numbered cause, is hereby GRANTED:

IT IS FURTHER ORDERED that said out-of-time petitions for rehearing are hereby DENIED.

ON CONSIDERATION OF THE MOTION of appellants Levine and Chippas for recall and stay of judgment issued as mandate in the above numbered and en-

titled cause, pending an application for a writ of certiorari to the Supreme Court of the United States,

IT IS FURTHER ORDERED that the judgment issued as mandate be recalled and stayed to and including thirty days from the date of this Order, the stay to continue in force until the final disposition of the case by the Supreme Court, provided that within said period there shall be filed with the Clerk of this Court the certificate of the Clerk of the Supreme Court that certiorari petition has been filed.

IT IS FURTHER ORDERED that the Clerk shall issue the judgment as mandate upon the filing of a copy of an order of the Supreme Court denying the writ, or upon the expiration of the above period unless the above mentioned certificate shall be filed with the Clerk of this Court within that time.

FILED September 12, 1973, U.S. Court of Appeals, Edward W. Wadsworth, Clerk.

Appendix "E"

AFFIDAVIT

NOW COMES your Affiant, STUART LEVINE, and after being duly sworn, deposes and says:

(1) Your Affiant was one (1) of three (3) defendants indicted by the Federal Government on June 22, 1973 in Miami, Florida in Cause No.: 72-497-Cr-PF.

(2) From shortly after the indictment in this case up until the day before the trial, Milton E. Grusmark represented your Affiant.

(3) On Friday before the trial date of August 21, 1972, your Affiant asked Mr. Grusmark how he would represent your Affiant and two (2) other co-defendents and would not this pose a conflict. Grusmark said not to worry. At no time did Mr. Grusmark explain to your Affiant that representing the two (2) other co-defendants would present a possible conflict as to your affiant. Your Affiant, on the other hand, did tell Mr. Grusmark that it was at the request of one (1) of the other two (2) co-defendants that your Affiant went to a meeting at a Motel Coffee Shop on May 24, 1972 and that your Affiant had no knowledge as to what purpose this meeting was arranged. Your Affiant insisted that another attorney be brought in to assist Mr. Grusmark. Mr. Grusmark reluctantly agreed, but stated he would retain ultimate trial strategy decision making powers for all three (3) defendants. Your Affiant then retained Mr. Melvyn Kessler and spoke to Mr. Kessler on Sunday, August 20, 1972 for approximately fifteen (15) minutes.

(4) Trial began on August 21, 1972 before the Honorable Peter T. Fay here in United States District Court for the Southern District of Florida. Mr. Melvyn Kessler stated on this date to the Court that he would represent your Affiant at trial.

(5) Your Affiant has lived in Dade County, Florida for over eighteen (18) years, is a family man whose twelve (12) year old son lives with him, and is a licensed Pharmacist with the States of Florida, New York and Washington, D.C. Your Affiant has no prior convictions and in all other ways has an exemplary character and reputation as a family man and a business man.

(6) Your Affiant, after hearing the Government's case against him, requested his attorney, Mr. Kessler, to allow your Affiant to testify in his own behalf. Mr. Kessler agreed and then conferred with Mr. Grusmark in order to obtain final approval. Mr. Grusmark told your Affiant and Mr. Kessler that if your Affiant testified in his own defense he would hurt the case against the other two (2) defendants and thus refused your Affiant's request to testify in his own behalf.

(7) Immediately after your Affiant's conviction in this case, Mr. Grusmark relieved Mr. Kessler as the attorney of record for your Affiant and represented your Affiant on his Appeal to the United States Court of Appeals for the Fifth Circuit along with representing co-defendants Chippas and D'Orsay.

FURTHER your Affiant sayeth not.

/s/ Stuart Levine

STUART LEVINE

STATE OF FLORIDA }
COUNTY OF DADE } ss.:

I HEREBY CERTIFY that on this day personally appeared before me, the undersigned Notary Public, STUART LEVINE, to me well known and known to me to be the person described in and who executed and subscribed to the foregoing Affidavit, and he acknowledged before me that he executed and subscribed to the same for the purposes therein expressed.

WITNESS my signature and official seal at Miami, Dade County, Florida, this 30 day of July, 1973.

/s/ H. Susan Roseman

NOTARY PUBLIC, State of Florida at Large. My Commission Expires July 8, 1977. Bonded thru Maynard Bonding Agency.

APPENDIX F

APPENDIX "F"

AFFIDAVIT

NOW COMES your Affiant, MELVYN KESSLER, Attorney at Law, who is admitted to practice in the State of Florida, the United States District Court for the Southern District of Florida and the United States Court of Appeals for the Fifth Circuit, and being duly sworn deposes as follows:

(1) Criminal Indictment No.: 72-497-Cr-PF was returned by a Federal Grand Jury sitting in Miami, Florida on June 22, 1972 charging the Defendants, Stuart Levine, Louis H. Chippas and Robert D'Orsay with conspiring to possess marihuana with the intent to dispense and distribute same and three (3) other related Counts.

(2) From the inception of Federal Criminal charges against the aforementioned three (3) defendants up to the 21st of August, 1972, the day trial began in this cause, all defendants were represented by Milton E. Grusmark, Attorney at Law, Miami Beach, Florida.

(3) Your Affiant was contacted by Milton E. Grusmark on August 18, 1972 and requested to represent Levine the following Monday at trial before the Honorable Peter T. Fay, United States District Judge. Your Affiant was retained only to appear in behalf of Stuart Levine at the time of trial and not to undertake pretrial motions and investigate the facts of the case since such had been accomplished.

(4) Your Affiant conferred with Stuart Levine on or about August 20, 1972 for a fifteen (15) to thirty (30) minute period of time. Your Affiant was uniformed as to whether any plea bargaining concerning Mr. Levine had been undertaken in his behalf.

(5) On August 21, 1972 trial commenced and your Affiant entered his appearance of record on behalf of Stuart Levine (TR. 44-45)*.

(6) The Defendant Levine has been a resident of Miami, Florida and a licensed Pharmacist with no prior record of convictions. Nowhere in the course of this trial was Levine the subject of competent testimony by any witness or credited with making any comments concerning anything of an illegal nature.

Both before and at the close of the Government's case I advised Levine to testify in his own behalf. Levine advised me that he wished to do so and state (1) his character was exemplary (2) he was a licensed Pharmacist and

(3) explain that his presence at the Miami Airways Motel Coffee Shop on May 23, 1972 at approximately 10:30 a.m. was at the request of one (1) of the other defendants and that he, Levine, had no knowledge of the true purpose of this meeting.

*TR. 44-45 — Refers to Transcript of proceedings before the Honorable Peter T. Fay, on August 21, 1972. Said Transcript is on file with this Court.

(7) Against your Affiant's strongly expressed wishes, Mr. Grusmark declined to have Levine testify on his own behalf, saying if Levine testified he would jeopardize the case against the other two (2) defendants, Chippas and D'Orsay. Levine did not testify.

(8) On August 23, 1972 the jury found the defendant guilty of Counts I and III (TR.565).

(9) On September 14, 1972, following Levine's conviction, Mr. Grusmark substituted as Levine's attorney for purposes of this Appeal, again contrary to your Affiant's strongly expressed wishes, since Mr. Grusmark was representing the other two (2) co-defendants. Based on these facts, your Affiant requested to represent Levine in order to avoid apparent conflict. In addition, your Affiant advised Levine to obtain independent counsel for this Appeal at all cost, and offered to represent Levine free of charge and insisted that Levine perfect his Appeal with any attorney other than that representing Chippas and D'Orsay.

FURTHER your Affiant sayeth not.

/s/ Melvyn Kessler

MELVYN KESSLER
Attorney at Law

STATE OF FLORIDA)
) ss.:
COUNTY OF DADE)

I HEREBY CERTIFY that on this day personally appeared before me, the undersigned Notary Public, MELVYN KESSLER, Attorney at Law, to me well known and known to me to be the person described in and who executed and subscribed to the foregoing Affidavit, and he acknowledged before me that he executed and subscribed to the same for the purposes therein expressed.

WITNESS my signature and official seal, at Miami, Dade County, Florida, this 25 day of June, 1973.

/s/ Signature Illegible
NOTARY PUBLIC, State of Florida

Notary Public State of Florida at Large
My Commission Expires Nov. 26, 1976
Bonded thru General Insurance Underwriters

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FILED
MAR 15 1974

No. 73-757

In the Supreme Court of the United States

OCTOBER TERM, 1973

STUART LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

ROBERT H. BORK,
Solicitor General,
Department of Justice,
Washington, D.C. 20530.

In the Supreme Court of the United States

OCTOBER TERM, 1973

No. 73-757

STUART LEVINE, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

Petitioner contends that he was denied effective assistance of counsel; that the evidence was insufficient to support his conviction; that the court failed to instruct on an essential element of one offense; and that the method of selection of grand and petit juries in the Southern District of Florida is unconstitutional.

Following a jury trial in the United States District Court for the Southern District of Florida, petitioner was convicted of conspiracy to import, possess, and distribute marihuana, and of aiding and abetting another in carrying a firearm unlawfully during the commission of a felony, in violation of 21 U.S.C. 846 and 963, and 18 U.S.C. 2 and 924(c)(2).[1] He was sentenced to im-

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[1]Co-defendants Robert D'Orsay and Louis H. Chippas were also convicted in the joint trial. See petitions for writs of ceritorari in *D'Orsay* v. *United States*, No. 73-5288, certiorari denied, December 3, 1973, and *Chippas* v. *United States*, No. 73-761 (filed November 12, 1973), in which we have filed a brief in opposition.

prisonment for concurrent terms of four years and one year, to be followed by two years' special parole; he was also fined $15,000. The court of appeals affirmed without opinion (Pet. App. A).

In 1972, agent John Stevenson of the Bureau of Narcotics and Dangerous Drugs and Juan Ortiz, an informant, worked undercover in the investigation of narcotics traffic by making themselves available as pilots (Tr. 72, 73). On May 20, 1972, Ortiz and co-defendant Chippas met at the Miami International Airport and looked over some DC-3 and Lockheed Lodestar airplanes (Tr. 79-80). Three days later, Ortiz and agent Stevenson met co-defendant D'Orsay at the airport motel coffee shop. After Ortiz introduced Stevenson as his co-pilot on the trip, they discussed in detail the use of a Lockheed Lodestar to transport a load of marihuana from Jamaica to Leesburg, Florida (Tr. 84, 85).

D'Orsay said that Ortiz and Stevenson would not be able to make contact with Chippas in Jamaica, but that Chippas would recognize their yellow Lockheed Lodestar when it landed in Jamaica. He also said that sometime after 6:30 p.m. that evening Chippas would call petitioner, who would advise Stevenson, through D'Orsay and Ortiz, when and where to go in Jamaica (Tr. 90-91). D'Orsay would then meet Ortiz and Stevenson and give them final instructions and the money to rent the airplane and to pay for gas and expenses (Tr. 91-92). Petitioner had gone to the bank that day to cash checks so the money would be available when Ortiz and Stevenson got the word to go (Tr. 92). D'Orsay said that he would give them a package containing a Beretta pistol which belonged to petitioner and which petitioner would want back at the end of the transactions (Tr.

89-90, 92-93).[2] After the discussion, the three men left the coffee shop and D'Orsay went to a car and got out a paper bag containing a Beretta pistol and a number of garbage bags, and gave them to Ortiz (Tr. 92-93).

On May 24, 1972, Ortiz and Stevenson met with D'Orsay and petitioner at the same coffee shop and Stevenson was introduced to petitioner as John, the co-pilot. D'Orsay stated that Chippas had called him that morning and expected Ortiz and Stevenson to fly to Kingston, Jamaica at 1:00 p.m. that day to pick up the load (Tr. 125-127). On the way out of the coffee shop, petitioner called Ortiz aside and they went into the bar for a few minutes. Ortiz had been searched before the meeting and found to have only $50. He was not out of Stevenson's sight after the search except when he went into the bar with petitioner. After the meeting broke up, Ortiz took 19 $100 bills out of his pocket and gave them to Stevenson. (Tr. 128-132).

Ortiz and Stevenson flew to Kingston that day, arriving about 11:30 p.m. (Tr. 135). The next day Chippas approached Stevenson and Ortiz at the airport and the men went to Chippas' motel room (Tr. 136, 140). While there, Chippas spoke of future narcotics deals, and stated that petitioner was in another business and that he used petitioner's clean name to front for his activities, that he paid petitioner very well for this and that petitioner liked the money (Tr. 144-147). Arrangements were made to load the marihuana at the Kingston International Airport.

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[2]It was stipulated at trial that petitioner was the registered owner of the gun and that prior to coming into the hands of petitioner, this gun had been shipped by the J.A. Galif Co. of New York to the Tamiami Gun Shop in Miami in September 1967 (Tr. 217-218).

The following day, Chippas obtained the marihuana and headed back to the airport (Tr. 154-155, 342, 316-317, 347). Jamaican police seized the truck which contained 27 burlap bags (Tr. 299-302), including two which contained marihuana (Tr. 330, 334-335, 338), and arrested Chippas (Tr. 159).

1. Petitioner's contention that he was denied effective assistance of counsel was raised for the first time in an untimely petition for rehearing which the court of appeals denied (Pet. App. D). Since the issue was not timely raised and the facts alleged have not been developed on the record, petitioner's proper remedy is a motion in the district court under 28 U.S.C. 2255. Cf. *Lawn* v. *United States,* 355 U.S. 339, 362, n. 16.

In any event, petitioner's contention is without merit. Petitioner retained Mr. Grusmark to represent him shortly after the indictment was returned on June 22, 1972; he had ample time to engage other separate counsel prior to the trial date of August 21, 1972. He subsequently retained Mr. Kessler to represent him at trial, and Kessler alone was his attorney during trial (Tr. 44-45; Pet. App. E, paragraph 3; Pet. App. F, paragraph 3). Grusmark did not enter an appearance for petitioner at trial (Tr. 45). Kessler had available to him the results of all the pre-trial motions which Grusmark had made on petitioner's behalf. Kessler did not request a continuance, and there is no basis for concluding that he was not able adequately to prepare for trial. See *United States* v. *Lacy,* 446 F. 2d 511 (C.A. 5).

Petitioner argues that Kessler was in fact only an assistant to Grusmark, and that the latter made the ultimate decisions for petitioner as well as his two co-defendants. He further argues that Grusmark could not adequately

represent him because of the conflict of interest resulting from his representation of the other two defendants. But Grusmark was not petitioner's attorney at trial, and there is no showing that Kessler's decisions at trial reflected anything other than his best professional judgment regarding the conduct of petitioner's defense. Since petitioner was represented by retained counsel, he must make an especially strong showing before it could be concluded that he had been denied effective assistance. See *United States ex rel. O'Brien* v. *Maroney*, 423 F. 2d 865, 869-870 (C.A. 3).

Mr. Kessler's representation of petitioner throughout the trial was vigorous and knowledgeable. Contrary to petitioner's claim (Pet. 14), Mr. Kessler and Mr. Grusmark objected to the introduction of hearsay evidence against their respective clients, and they requested and were granted a cautionary instruction on the admissibility of hearsay evidence in a conspiracy (Tr. 94-96, 108-109, 123-124). Also, contrary to petitioner's claim, both Mr. Kessler and Mr. Grusmark objected to the introduction of co-defendant D'Orsay's post-arrest statement on a variety of grounds, and both counsel moved for a severance and a mistrial (Tr. 236-241, 244-246). Even if any of counsel's trial tactics could be considered errors of judgment, they are not sufficient to establish ineffective assistance of counsel. *McMann* v. *Richardson*, 397 U.S. 759, 770-771.

The trial record shows that Mr. Kessler had sole responsibility for petitioner's defense throughout the trial[3] (see, *e.g.*, Tr. 45, 70, 147, 172-190, 237,

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[3]Petitioner was represented by separate, private counsel at trial, and there was thus no reason, contrary to petitioner's contention (Pet. 17), for the court to inquire, *sua sponte*, whether counsel had a conflict of interest.

247-260, 386-393). Nevertheless, petitioner contends that Mr. Kessler did not act independently in not allowing petitioner to testify (Pet. Apps. E and F). Petitioner points nothing in the record that supports this claim. The decision not to testify was, we submit, a tactical decision of petitioner and his counsel Kessler, and, as such, does not establish ineffective assistance of counsel. See *United States* v. *Marcello,* 423 F. 2d 993, 1005 (C.A. 5), certiorari denied, 398 U.S. 959; *Sims* v. *Lane,* 411 F. 2d 661, 664-665 (C.A. 7), certiorari denied, 396 U.S. 943, and cases cited therein.

2. Petitioner contends that the evidence was insufficient to show either that he was a part of the conspiracy to import marihuana or that he aided and abetted another in the unlawful possession of a firearm during the commission of a felony.

a. The court of appeals reviewed the evidence, and found it sufficient to uphold the jury's verdict. There is no occasion for further review of this factual issue. Moreover, the evidence summarized at pages 2-4, *supra,* shows the existence of a conspiracy and petitioner's participation therein.

b. The evidence was also sufficient to support petitioner's conviction for aiding and abetting D'Orsay in carrying a firearm unlawfully during the commission of a felony.[4] D'Orsay was carrying the firearm while engaged in a conspiracy to import marihuana, which is a federal felony (Tr. 89-90, 92-93). The gun belonged

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[4]Petitioner received a one-year sentence for this offense, concurrent with the four-year sentence for violation of 21 U.S.C. 846 and 963. Consequently, if the conviction under the latter charge is valid, the Court need not consider the contentions with regard to the former charge. See *Benton* v. *Maryland,* 395 U.S. 784, 791; *Barnes* v. *United States,* 412 U.S. 837, 848, n. 16.

to petitioner (Tr. 217-218), who wanted it back at the completion of the illegal venture (Tr. 90). In light of these facts and the fact that petitioner was also a part of the conspiracy to import marihuana, the inference is overwhelming that petitioner gave D'Orsay the gun solely at the time of, and for use in, the conspiracy. Petitioner's knowledge of the illegal purpose for which D'Orsay intended to use the gun may be inferred from such circumstances. See *United States* v. *Calabro,* 467 F. 2d 973, 982 (C.A. 2), certiorari denied, 410 U.S. 926.

3. Petitioner contends that the trial court erred in failing to instruct the jury as to the meaning of "unlawfully" in the crime of carrying a gun unlawfully during the conspiracy. Petitioner, however, did not object to this failure to instruct at the trial, as required by Rule 30, Fed. R. Crim. P., and he may not now be heard to complain that the trial court's instructions were erroneous. *United States* v. *Atkinson,* 297 U.S. 157.

Furthermore, the alleged error is not so fundamental as to constitute plain error which may be considered even though not raised in the trial court. At least one Circuit has interpreted 18 U.S.C. 924 (c)(2) to require proof that carrying the firearm in itself was unlawful and to require an instruction so stating, at least where there was no evidence as to the lawfulness of the carrying. *United States* v. *Ramirez,* 482 F. 2d 807, 814 (C.A. 2). Here, however, the uncontradicted evidence showed that the carrying of the firearm by the principal, D'Orsay, was unlawful in itself, as a violation of 18 U.S.C. App. 1202(a)(1), since D'Orsay was a previously convicted felon (Tr. 292).

In order to convict for aiding and abetting, the evidence need show only that the principal committed an of-

fense and that the defendant aided and abetted him in doing so. *United States* v. *Deutsch,* 451 F. 2d 98, 118-119 (C.A. 2), certiorari denied, 404 U.S. 1019. The evidence showed that the principal, D'Orsay, carried the gun unlawfully during the conspiracy (Tr. 89-90, 92-93, 217-218, 292), which is an offense under 18 U.S.C. 924(c)(2). As previously shown, petitioner aided and abetted the commission of this crime by providing D'Orsay with the gun, which he knew would be carried in the conspiracy.

4. Petitioner attacks the composition of the grand and petit juries which indicted and convicted him, contending that they were improperly selected in that they excluded naturalized Cubans and young adults. These contentions were raised and fully answered in our memoranda in opposition in the companion case of *D'Orsay* v. *United States,* No. 73-5288, certiorari denied, December 3, 1973, and in *Crews* v. *United States,* No. 72-6021, certiorari denied, 411 U.S. 908, upon which we rely here.[5]

Petitioner also contends that he was denied due process because the composition of his juries was affected by 28 U.S.C. 1865(b)(1), which he contends is unconstitutional (Pet. 31). That provision requires federal jurors to have resided for one year within the judicial district in which they are to serve. In order to invalidate a jury selection plan, it must be shown that it excludes a "cognizable group" of persons, and not merely that it excludes some persons. See *United States* v. *Gast,* 969; *Grimes* v. *United States,* 391 F. 2d 709 (C.A. 5). Persons with less than one year's residence in a judicial district are no more cognizable as a group than are per-

[5]We are providing petitioner's counsel with these memoranda.

sons who choose not to register to vote, or persons between the ages of 18 and 21. The exclusion of such persons has been upheld. See *Grimes* v. *United States, supra; United States* v. *McVean,* 436 F. 2d 1120, 1122 (C.A. 5), and cases there cited.

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ROBERT H. BORK,
Solicitor General.

MARCH 1974.

